

STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES
OF PROFESSIONAL CONDUCT

ORIENTATION SESSION AGENDA

Friday, September 28, 2001 (9:30 am to 4:00 pm)

Oakland Airport Hilton
Boardroom 2 -BLDG 5
1 Hegenberger Road
Oakland, CA 94621
(510) 635-5000

I. Chair's Welcome and Introductory Remarks

a. Introduction of Commissioners and Overview of Orientation Session:

i. Commission membership, officers, and terms of service.

There are 14 members who serve on the Commission, including a Chair and one non-lawyer public member. Each Commissioner is appointed for the duration of the Commission's work. Materials considered by the State Bar Board of Governors in endorsing the return of the Commission contemplated a five year project.

ii. Commission's relationship to State Bar:

The Commission is a special commission of the State Bar of California. The Commission reports to the Board of Governors Committee on Regulation and Discipline. The Commission is administered through the State Bar's Professional Competence Unit with State Bar Executive oversight provided by the State Bar General Counsel. Staff assistance also is anticipated to be provided by the Office of the Executive Director and the Office of the Chief Trial Counsel.

iii. Professional Competence Unit Staff.

- (1) Randall Difuntorum, Senior Staff Attorney — Acts as staff counsel to the Commission, provides general guidance in substantive matters and State Bar procedures.
- (2) Lauren McCurdy, Senior Administrative Specialist — Oversees staff assistance to the Commission in administrative matters.
- (3) Audrey Hollins, Administrative Secretary -- Assists the Commission in administrative matters, including expense reports, compilation of agenda materials and agenda distribution, maintenance of a Commission roster and Commission information posted to the State Bar

website.

- (4) Ethics Hotline Staff — The State Bar Ethics Hotline staff, including Staff Attorney Mark Taxy and five paralegals may be utilized to assist in the Commission's work, subject to their availability.

b. Commission Charge.

The Commission's charge is as follows:

The Commission is to evaluate the existing California Rules of Professional Conduct in their entirety considering developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989 and 1992. In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the ABA Ethics 2000 Commission, the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers, as well as other authorities relevant to the development of professional responsibility standards. The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to Multi-Disciplinary Practice, Multi-Jurisdictional Practice, court facilitated propra persona assistance, discrete task representation and to other subjects that have a substantial impact upon the development of professional responsibility standards.

The Commission is to develop proposed amendments to the rules that:

- Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
- Assure adequate protection to the public in light of developments have occurred since the rules were last reviewed and amended in 1989 and 1992;
- Promote confidence in the legal profession and the administration of justice; and
- Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

c. Oral Report on Action Taken by the ABA House of Delegates at the ABA 2001 Annual Meeting held in Chicago

Staff and Commissioners who attended the ABA House of Delegates meeting will provide a brief oral report.

d. The Orientation Session

The goals of the orientation session are to: (1) cover key administrative and operational matters; (2) address provided background materials; and (3) begin discussion of methodology.

II. Key Administrative and Operational Matters

- a. Noticed Open Session Meetings -- With limited exceptions, the action of the Commission shall occur in noticed open session meetings.

The State Bar of California, as a judicial branch agency of state government, is subject to open/closed meeting rules, comparable to, but not exactly the same as the Bagley-Keene Open Meeting Act (Govt. Code Sections 11120, et seq.) and the Brown Act (Govt. Code Sections 54950, et seq.) which are applicable to other state bodies and local public agencies. These Asunshine® provisions favor open meetings, open discussion and deliberation, and notice in advance of topics to be discussed during meetings of public entities.

Business and Professions Code Section 6026.5 and the Rules Governing Open Meetings, Closed Sessions and Records of the Board of Governors of the State Bar of California set forth the legal standards governing the open/closed status of State Bar meetings. But beyond these legal provisions, the State Bar aspires to the principle that the meetings not only of its Board, Board Committees, Task Forces, Subcommittees, and Regulatory Committees but of all non-Board sub-entities as well be noticed and open when State Bar business is being acted upon, except where confidentiality is legally permitted. (See, State Bar Administrative Manual, Div. 6, Ch. 8, Section 7; Div. 6, Ch. 16, Section 2).

Under these provisions, it is the aspiration of the State Bar that whenever elected or appointed State Bar representatives conduct State Bar business, whether by conference call or meeting, that meeting is to be noticed ten days in advance, except for emergency circumstances or where the meeting is a continuation of a previously noticed meeting. This standard legally applies to formal Board of Governor, Board Committee and Regulatory Committee meetings, but is also the aspirational goal with respect to non-Board non-regulatory sub-entity meetings held to act upon State Bar business.

In order to encourage compliance with these principles by staff, Board members and other appointed and elected State Bar representatives, the Office of the Executive Director/Secretary is implementing the following procedures:

- 1) As a general principle, meetings of the State Bar sub-entities are to be noticed ten calendar days in advance. This is a legal requirement for Board, Board Committees and Regulatory Committees. The Notice of Meeting, along with an Agenda for the meeting, is to be filed with the office of the Executive Director/Secretary ten days prior to the meeting. An example of a meeting notice and agenda are attached. The Office of the Executive Director/Secretary will assist unstaffed sub-entities with these requirements.
- 2) A copy of the Meeting Notice and Agenda will be filed by the Executive Director/Secretary with the State Bar's Office of Communications for appropriate internal and public distribution.

3) This is true for all open and closed meetings. Although the agenda materials and content of a closed meeting are confidential, the meeting and the general topics to be discussed are subject to disclosure.

4) Following the meeting, an Action Summary of the action taken at the meeting on Action items identified in the Agenda is to be prepared and filed with the Office of Executive Director/Secretary within ten days of the Action Summary being approved by the group meeting.

5) Any meeting that is called on an emergency basis where ten days notice is not possible, must be cleared through both the Office of Executive Director/Secretary and the Office of General counsel to assure that the declaration of an emergency is appropriate. A statement of any action taken at an emergency meeting must be included in the Notice and Agenda of the next properly noticed meeting. (See State Bar Administrative Manual, Div. , Ch. 16, Section 4.)

6) Any action taken, conclusions reached or other guidance developed at the meeting that is not properly noticed is voidable and should not be relied upon, utilized, or referred to with respect to the conduct of State Bar business.

b. Media Contact - Great care must be taken when discussing Commission business with the news media. Inquiries from the media regarding Commission business should be directed through the Chair or Staff Counsel.

c. Commissioner Conflicts - Disclosure of a Commissioner's personal involvement with issues under consideration by the Commission are subject to the following protocol:

Commissioners shall disclose any professional or intimate personal relationship with any person or entity providing comments or testimony to the Commission or in attendance at any Commission meeting. Commissioners also shall disclose any other relationship or interest that might have, or reasonably appear to have, a significant effect on that Commissioner's participation or votes. The affected Commissioner may voluntarily disqualify himself or herself from votes and but is encouraged to participate in discussions once a relationship or interest is disclosed so that the Commission will have the benefit of that Commissioner's special knowledge, if any, about the particular subject matter. Mandatory disclosures and voluntary disqualification pursuant to this protocol shall be recorded in a relevant Commission action summary.

d. Budgetary Considerations - Administrative cooperation by early airline reservations, use of State Bar airline "discount number" by your travel agent; and timely submission of expense reports is important. Limited reimbursement is available for identified reimbursable expenses. Refer to _____ for details.

e. Software Compatibility - The State Bar uses Corel WordPerfect 9 as its primary word processing application. Documents submitted in other formats may result in delays due to conversion issues. The State Bar uses Microsoft Outlook as its e-mail application and ordinarily can receive all forms of e-mail messages and attachments. E-mail messages formatted as plain text, not HTML, are preferred. Also, e-mail software that uploads message attachments using MIME encoding (rather than Uencode) may cause transmission problems. If you don't know if your e-mail

application uses MIME encoding, then your first message to staff containing an attached word processing document will reveal any compatibility problems.

- f. Proposed 2001- 2002 Schedule of Meetings - The Chair, in consultation with staff, has prepared a proposed schedule of meetings. Commissioners should review the attached proposed schedule in preparation for finalization at the orientation session.

III. Summary of Provided Background Materials - The Prior Work of the Commission; Rule Revisions Considered or Adopted During the Commission's Abeyance Status; Other Significant State Bar or Supreme Court Studies and Reports

Staff will provide an outline and present a power point presentation addressing enclosed background materials.

IV. Discussion of Methodology and Other Strategic Planning Matters

- a. Elements of the Usual State Bar Rule Revision Process:
 - i. Initiation of a request for consideration of a possible rule amendment (i.e, from: the Board of Governors; a State Bar Committee or Section; a Supreme Court Advisory Committee or the Judicial Council; a legislator or other public official; a statutory mandate; Office of the Chief Trial Counsel, a local or specialty bar association; or a State Bar member.)
 - ii. State Bar staff review of request and referral to a Board Committee or a State Bar committee.
 - iii. Study and report by State Bar staff or a State Bar committee.
 - iv. Board Committee Consideration of a report (usually recommending solicitation of public comment on the proposed amendment).
 - v. Board Committee authorized public comment distribution of a proposed rule amendment (minimum comment period is 60-days, see State Bar Administrative Manual Vol.1, Div. 5, Ch. 5, Art. 1, Sec. 4).
 - vi. State Bar staff or State Bar committee consideration of public comments received.
 - vii. Possible Modification of proposed amendment and report to Board Committee addressing public comment received (recommendation may be to: seek additional public comment on a modified proposal; recommend adoption of the original or modified proposal by the full Board followed by transmittal to Supreme Court for approval; or reject the proposal and take no further action).
 - viii. If the proposal is adopted by the Board, then a memorandum seeking approval is prepared by the Office of General Counsel and filed with the Supreme Court.

- ix. Supreme Court approves, denies or questions the State Bar's recommended rule amendment and the State Bar responds in accordance with the Supreme Court's action.

b. Possible Commission Methodologies for Study

A clearly defined methodology is needed to ensure that the Commission accomplishes all aspects of its charge. It is also important to allow staff and the Chair to create and maintain an effective inventory that will facilitate productive assignments, fair division of labor and adequate meeting agendas. Strategic planning at the outset also is likely to garner the confidence of the many interested parties who will be close observers of the Commission's work. In connection with the prior work of the Commission, the Commission's methodology was to account for every concept raised by the then new ABA Model Rules of Professional Conduct. As the ABA issues are only one major aspect of the Commission's charge, this prior methodology would likely be under inclusive. For discussion purposes, some possible alternative approaches are provided:

- i. topical approach - individuals or teams are assigned to study identified topics and to report on relevant rule amendments (topics, such as the chapter divisions found in the rules, would be crafted and organized so as to account for every current rule and every key issue noted in the Commission's charge, i.e., multi-disciplinary practice);
- ii. "divide & conquer" approach - individuals or teams are assigned to study an identified rule or ad hoc group of rules and to report on all relevant proposed amendments (issues noted in the Commission's charge would be attributed to certain current rules for study purposes, i.e., multi-disciplinary practice concerns could be linked to the fee splitting rule, the conflicts rules and others, as appropriate);
- iii. seriatim approach - the entire Commission considers each rule starting with rule 1-100 and as each rule comes up for discussion an individual or team is assigned to implement the Commission's consensus proposal for amendment; this approach could be augmented by assigning certain teams to serve as standing experts on certain key areas such as ABA Ethics 2000, the Restatement, developments in California law, multi-disciplinary practice concerns, multi-jurisdictional practice concerns, access to justice concerns, and etc...; or
- iv. "rules first" approach - individuals or teams are assigned to study an identified rule or ad hoc group of rules and to report on all relevant proposed amendments focusing on issues presented by ABA Ethics 2000, the Restatement, and California developments but without regard to the issues raised by the pending multi-disciplinary or multi-jurisdictional practice concerns (the ABA Ethics 2000 adopted a similar posture on multi-disciplinary practice as this concept was the subject of a concurrent ABA study); the other pending issues would be scrutinized after a run-through of the entire rules.

c. Concept of a Commission "Reporter"

As consider by State Bar staff and the Board of Governors, the reactivation of the Commission includes the possibility of obtaining a Commission reporter. The budget projections for the five year Commission project accommodates a part-time contract attorney (at a contract rate of approximately \$35,000 a year). The ABA Ethics 2000 Commission utilized multiple reporters who drafted much of the proposed amendments, the commentary and the explanatory materials. The State Bar staff and the Board of Governors have no expectations about how the Commission might want to implement its own reporter, if at all. One approach, different from the ABA, would be to have the reporter serve as a research assistant for the Commission. As State Bar staff can provide only limited research assistance, this approach could prove very helpful to the Commission. For example, the reporter could be assigned to assist in the research of rules and standards adopted in other jurisdictions. If this is desirable, then the title for the contract position could be "research assistant" rather than "reporter." In addition, the Commission is free to set its own time-frame for recruiting and hiring.

d. Proposal for a Commission Vice-Chair

Presently, the appointment of the Commission establishes only one officer among the members of the Commission. Staff believes that it would be in the Commission's best interest to establish a Vice-Chair position. The primary purpose of establishing a Vice-Chair position is to have an alternate Commissioner ready to preside over Commission business in the event the Chair is unavailable. Secondly, in the interest of continuity, a Vice-Chair would be a likely candidate to be appointed as the future Commission Chair, many years from now when the Commission might again be recalled into service. A Vice-Chair would be selected from the current members of the Commission. The anticipated process would be: (1) self-selection by the Commission of a nominated candidate for recommendation to a Board Committee; (2) Board Committee action to recommend that the candidate be appointed by the full Board of Governors; and (3) Board of Governor action to appoint the Vice-Chair. This process tracks the process used by most standing committees in the appointment of officers and members. However, subject to advice of General Counsel, it may be possible to implement a Vice-Chair position through a different procedure.

V. **Chair's Concluding Remarks**